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IN THE

# Supreme Court of the United States

October Term, 1968
No. 464

COURTESY CHEVROLET, INC.,
*Petitioner,*

*vs.*

TENNESSEE WALKING HORSE BREEDERS, ETC., *et al.*,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

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COURTESY CHEVROLET, INC.,

*Petitioner,*

*vs.*

TENNESSEE WALKING HORSE BREEDERS, ETC., *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

### Introductory Paragraph.

Courtesy Chevrolet, Inc., a corporation, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 23, 1968, following denial of your Petitioner's timely Petition for Rehearing therein on May 28, 1968.

### Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit entered May 3, 1965 (Appendix I) is reported at 344 F. 2d 860. The opinion of the United States Court of Appeals for the Ninth Circuit entered April 23, 1968 (Appendix II) is reported at 393 F. 2d 75. The only opinion rendered by the United States District Court for the Central District of California was a Memorandum Opinion *re* Attorneys' Fees

and Costs, dated September 13, 1966; this opinion, not reported, is set forth at Appendix III. The oral decision of the District Court for the Central District of California is contained in the Reporter's Transcript at pages 1269 to 1277, and is set forth at Appendix IV.

## Jurisdiction.

The Judgment of the United States Courts of Appeals for the Ninth Circuit was entered on April 23, 1968. A timely Petition for Rehearing was denied on May 28, 1968 (Appendix V, below). The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, §1254(1); 28 U.S. Code, §1651; 28 U.S. Code, §2106, and Rule 19(b) of the Revised Rules of the United States Supreme Court.

## Questions Presented.

1. Whether, in a private anti-trust action, if the Trial Court finds that a plaintiff has been damaged by reason of defendant's unlawful activities, plaintiff's damages must be limited to those items proved with absolute certainty, once the fact of damage resulting from the unlawful activities has been proved.

2. Whether, in such an action, a plaintiff is entitled to general damages.

3. Whether since there was a showing of damages in excess of the loss of fees from the services of only one of Petitioner's studs, and for more than only one year, the District Court erred in not awarding at least something for such additional damages.

4. Whether the evidence of plaintiff's damages, resulting from defendant's unlawful activities, was so uncertain and indefinite that the Trial Court could not,

as a matter of law, have made a reasonable estimate thereof.

5. Whether, in such an action, once the *fact* of damages has been established, the plaintiff is to be denied reasonable attorneys' fees under the provisions of 15 U.S. Code, §15, merely because the *extent* of damages is difficult of precise ascertainment.

6. Whether the Court(s) below erred in not requiring a finding as to the reasonable value of Petitioner's attorneys' services.

7. Whether the District Court erred in holding that the test as to reasonable attorneys' fees in a private anti-trust action is not what plaintiff's attorneys should be paid, but rather what sum should be contributed by the defendants to plaintiff's attorneys' fees, without regard to what a reasonable fee would be.

8. Whether the award of attorneys' fees is, in any event, inadequate and contrary to the evidence.

9. Whether the Court of Appeals erred in not discussing any of the points of law raised by the extensive briefs filed by both parties to the appeal.

## Statutes Involved.

The following statutory provisions are set forth in Appendix VI: 15 U.S. Code, §1; 15 U.S. Code, §2; 15 U.S. Code, §15; 15 U.S. Code, §26.

## Statement.

This case originated with the filing of a Complaint by Petitioner under the provisions of the Federal Anti-trust Laws, on Petitioner's allegations that it had been injured in its business and property by reason of Respondent's and others' violations of §§1 and 2 of Title 28 of the United States Code, commonly referred to as

§§1 and 2 of the Sherman Antitrust Act. The Findings of Fact and Conclusions of Law of the District Court, in so far as Respondent's unlawful activities are concerned, are not in conflict.

The Complaint originally joined with Respondent various of its Directors and officers as parties defendant. The Trial Court dismissed the action as to all parties and ordered service quashed. Upon appeal to the United States Court of Appeals for the Ninth Circuit, the District Court's Order quashing service and Judgment of Dismissal was reversed as to Respondent. (*Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' etc. of America, et al.*, (1965) 344 F. 2d 860; Appendix I hereto.)

The case then proceeded to trial without a jury on June 29, 1966, and continued through July 11, 1966. Findings of Fact, Conclusions of Law and Judgment for Petitioner were made and entered on October 20, 1966 (Appendix VII). Following a timely Motion by Petitioner, the District Court modified its Judgment to provide for costs to Petitioner on December 9, 1966.

Petitioner is a corporation which, among other activities, is engaged in the breeding, training, sale, boarding and exhibition of Tennessee Walking Horses and owns and operates a breeding farm and stables for those purposes (Facts 1, 2).[1] Prior to July, 1963, Petitioner had invested the sum of $711,218.70 for its facility located at Somis, California [R. T. 151].[2]

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[1]Findings of Fact and Conclusions of Law, Facts 1 and 2. Petitioner refers to Findings of Fact herein as "Fact ....."; Conclusions of Law as "Law .....".

[2]Reporter's Transcript of Proceedings, June 29, 1966 through September 6, 1966.

Respondent is incorporated in the State of Tennessee, has members located in various areas throughout the United States, and at the time of the acts complained of transacted business and was found in, and the acts complained of occurred within, the Central District of California (Facts 3, 4 and 8). The Trial Court found that one of the objectives of Respondent is to collect, record and preserve the pedigrees of the strain of horses known as Tennessee Walking Horses and the publication of a Register or stud book and other matters pertaining to the breeding, exhibiting and sale of such horses (Fact 5). It is the only association engaged in recording the pedigrees of such horses and the issuance of pedigree papers to individual owners and transferees (Fact 6).

Respondent is the only association in which Tennessee Walking Horses may be registered as such and maintains the only generally recognized registry of Tennessee Walking Horses (Facts 6, 11). Without such registration a horse cannot compete in Tennessee Walking Horse shows (Fact 19) and no foal of any unregistered Tennessee Walking Horse may be registered as a Tennessee Walking Horse. The market value of a Tennessee Walking Horse is substantially depressed if the horse cannot be registered (Fact 20). Respondent's By-Laws permit the registration of Tennessee Walking Horses by non-members of the Association, as well as members, but at a different charge (Fact 22). Initial membership fees and annual membership fees are required to be paid by each member [R. T. 79].

Respondent collects and disseminates information concerning the breed to its members throughout the United States by means of a monthly Bulletin (Fact

7). Respondent establishes, publishes and enforces regulations for the judging, showing and performance of Tennessee Walking Horses (Fact 13), maintains a list of recognized licensed judges and attempts to supervise their performance (Facts 14, 15).

Respondent also sponsors some classes at horse shows by donating trophies and prize money (Fact 16).

On and prior to July 13, 1963, Petitioner was a member in good standing of the Association (Facts 2, 32) and R. Mitchell McClure, Petitioner's President, was the Regional Vice President of Respondent (Fact 29). Prior to July 13, 1963, Petitioner had invested the sum of $711,218.70 in its business of breeding, raising, showing and selling horses for profit [R. T. 151]. Petitioner was dependent upon its membership in Respondent for the successful conduct of that business and had advertised and held itself out to the public, and particularly to prospective purchasers of its horses and services, that it had been a member of Respondent and directly identified therewith (Fact 2).

On July 13, 1963, Respondent was found to have arbitrarily and unreasonably suspended Petitioner's membership in Respondent (Law 6d, 6e; Facts 30, 32). Petitioner's membership dues were refused (Fact 38). Notice of the suspension of Petitioner and R. Mitchell McClure was published in the Respondent's Bulletin, on the front page, bordered in black (Fact 32). The services of Respondent, including the registration of horses, transfer thereof, or showing before judges of Respondent, were denied the Petitioner (Fact 32; Law 6) notwithstanding such services were available to non-members of Respondent (Fact 22). One of Petitioner's stallions, "Mr. Millionaire", had sired colts owned by

persons disassociated from Petitioner (Fact 33). These persons applied for registration of the colts, which applications were denied by Respondent because of Petitioner's suspension (Fact 34).

At the time of the filing of this action, a majority of Respondent's officers, directors and agents were engaged in the business of breeding, training, sale and exhibiting of Tennessee Walking Horses and to some degree were competing with Petitioner (Fact 39) and the Trial Court found that the unlawful activities of Respondent were in part motivated by their selfish personal financial interests (Law 5), and that their actions in boycotting and restricting Petitioner were done for the purpose of destroying the business of Petitioner and others similarly situated (Law 6d).

The District Court entered Judgment for Petitioner. The Judgment enjoined Respondent from refusing to register Petitioner's horses and foal from mares owned by third persons and bred by stallions owned by Petitioner. It directed Respondent to register the transfer of horses and cause the same to be immediately consummated. It enjoined Respondent from denying Petitioner any of the privileges of Respondent and ordered it to reinstate Petitioner's membership. Respondent was ordered to publish in its next monthly bulletin the Court's Judgment in full, together with a notice of Petitioner's reinstatement. Petitioner was awarded damages in the sum of $3,400.00, trebled to $10,200.00, together with the sum of $5,000.00 as attorneys' fees (Judgment). Pursuant to its Order Modifying Judgment, Petitioner was also awarded Court costs.

The damages of $3,400.00 consisted of the loss of stud fees of one of Petitioner's stallions during the year

1964 (Law 15). The District Court denied recovery of other damages based on its finding that "the evidence of other damage to plaintiff is too indefinite and speculative to permit the Court with any degree of certainty to estimate the amount thereof." (Fact 42, Law 16). The Trial Court did not, however, find that Petitioner had not sustained other damages.

The evidence presented by Petitioner on damages was essentially in three categories:

1. Losses incurred during the period of unlawful activities, in excess of those in the last full calendar year prior to the illegal suspension, totalling $130,-176.34.

2. Testimony of those professionally engaged in the training, breeding, exhibition and sale of Tennessee Walking Horses that Petitioner might reasonably be expected to realize an annual return of ten to fifteen per cent on its invested capital.

3. Testimony of Petitioner's President, trainer and other expert witnesses that Petitioner would reasonably be expected to derive the sum of $79,000.00 per year in net profits from its breeding program, but for the unlawful activities of Respondent.

With respect to attorneys' fees, the Trial Court found as facts that (Facts 43-52):

1. Plaintiff's attorneys expended more than 2,-289½ hours in the preparation and presentation of this case, excluding time spent up to and including the prior successful appeal to this Court.

2. There was no prior action by the government and plaintiff's counsel had not had the benefit of a prior Judgment or Decree.

3. Counsel for both plaintiff and defendant have outstanding reputations at the bar.

4. The trial involved novel and difficult points of law and involved fact situations not previously reported in antitrust litigation.

5. Plaintiff's counsel traveled extensively throughout the United States to gather evidence and interview witnesses and was required to rely to a considerable extent on the testimony of adverse witnesses to establish its case.

6. Plaintiff's counsel has done a "prodigious amount of work" in presenting this case.

7. Plaintiff expended $78,496.40 in attorneys' fees, travel expense, and other out-of-pocket expenses.

8. Defendant should be required to "contribute" $5,000.00 toward attorneys' fees.

The Court of Appeals for the Ninth Circuit reversed the District Court's Judgment on the sole question of attorneys' fees noting that the "highly respected and competent" expert testimony was that the reasonable value of Petitioner's attorneys services was $140,000.00 to $150,000.00, directing the District Court to increase attorneys' fees to $10,000.00. (See Appendix "II"). As to all other matters, the Judgment of the District Court was affirmed, the Court stating, as to damages:

> "After careful review of the record in the case and due consideration of the briefs and oral arguments of the attorneys, we are unable to say that the findings of fact of the District Court and its conclusions of law thereon are clearly erroneous in respect to the award of $10,200.00, although the compensation allowed seems quite low in the circumstance." (393 F. 2d 75, at page 77).

## REASONS FOR GRANTING THE WRIT.

### I.

### Damages.

#### A. Public Policy of the Federal Antitrust Laws.

If the Judgment of the District Court is permitted to stand, the private enforcement of the Antitrust Laws will have been dealt a serious impairment, as few businesses can afford the expense of a private antitrust action when their damages are to be limited to those which can be proven with absolute certainty.

As stated in *Atlantic City Electric Co. v. General Electric Co.* (D.C. S.D.N.Y. 1964) 226 F. Supp. 59, 71, appeal denied 337 F. 2d 844 (relying on this Court's decision in *United States v. Borden Co.,* (1954), 347 U.S. 514, 518, 74 S. Ct. 703, 706, 98 L. Ed. 903):

> "Finally, the most significant consideration is the strong policy in favor of private treble-damage actions, which are intended not only to compensate those injured by violation of the Antitrust Laws, but also to function as an independent method of enforcing antitrust policy."

This Court has stated, and the Courts below have apparently disregarded:

> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."
>
> *Bigelow v. RKO Radio Pictures, Inc.,* (1946), 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. Ed. 1040.

**B. The District Court's Judgment Is Squarely in Conflict With Rules Laid Down by This Court in the Ascertaining of the Amount of Damages Once the Fact of Damages Has Been Proven.**

The decision of the District Court, and the affirmation by the Court of Appeals, on the question of Petitioner's damages, is squarely in conflict with this Court's decision in *Story Parchment Co. v. The Paterson Parchment Paper Co.*, (1931) 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Eastman Kodak Co. v. Southern Photo Material Co.*, (1923) 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684; and *Bigelow v. RKO Radio Pictures*, (1946) 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 1040, and with decisions in other Circuits, such as: *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, (C.A. Ohio, 1966), 358 F. 2d 790; and *Pennington v. United Mine Workers of America*, (C.A. Tenn., 1963) 325 F. 2d 804, reversed on other grounds, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626, certiorari denied 381 U.S. 949, 85 S. Ct. 1796, 14 L. Ed. 2d 723, as well as decisions in the Ninth Circuit, itself, such as *Flintkote Co. v. Lysfjord*, (9th Cir. 1957) 246 F. 2d 368.

The Courts below gave no recognition to the principles set down by this Court with respect to the following language:

> ". . . [W]hen, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make

the most intelligible and probable estimate which the nature of the case will permit."

*Story Parchment Co. v. The Paterson Parchment Paper Co.*, (1931) 282 U.S. 555, 564, 51 S. Ct. 248, 251, 75 L. Ed. 544.

Petitioner's business was barely started when Respondent completely foreclosed Petitioner from any possibility of profits through the means of a total and unlawful boycott, motivated, at least in part, by the "selfish, personal, financial interest" of Respondent's directors (Law 5).

Yet, the District Court limited Petitioner to only that single item of damage that it was able to prove with absolute certainty, entirely overlooking this Court's directions that it is the wrongdoer who should bear the risk of uncertainty (*Bigelow v. RKO Radio Pictures, Inc., supra*), not the innocent, and that the Court should have made "the most intelligible and probable estimate which the nature of the case will permit,"

*Story Parchment Co. v. The Paterson Parchment Paper Co.*, (1931) 282 U.S. 555, 564, 51 S. Ct. 248, 251, 75 L. Ed. 544.

**C. The District Court's Judgment Is Squarely in Conflict With Rules Laid Down by the Ninth Circuit as Well as Other Circuits.**

The Ninth Circuit, in the past, has followed this Court's mandate set down in, for example, *Bigelow v. RKO Radio Pictures, Inc., supra.* Thus, in *Flintkote Co. v. Lysfjord*, (9th Cir. 1957/1937?) 246 F. 2d 368, at page 392, the Ninth Circuit stated:

"We take it that the controlling rule today in seeking damages for loss of profits in antitrust

cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and *some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data,* and render its verdict accordingly.' *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at page 264, 66 S.Ct. at page 580. The cases have drawn a distinction between the quantum of proof necessary to show the fact as distinguished from the amount of damage; the burden as to the former is the more stringent one. In other words, the fact of injury must first be shown before the jury is allowed to estimate the amount of damage." (Page 392) (Emphasis supplied).

But the opinion of the Ninth Circuit below, entirely overlooks these concepts.

## II.

## Attorneys' Fees.

### A. The Failure of the Courts Below to Award a Reasonable Attorneys' Fee, or to Make a Finding of Fact as to Such a Fee as Requested, Requires Review to Avoid Degradation of the Antitrust Laws.

The Court of Appeals' opinion below recognized that the District Court abused its discretion in awarding an attorneys' fee of only $5,000.00 (393 F. 2d 75 at p. 77) and directed that the fee be increased to $10,000.00 (393 F. 2d 75 at p. 77). In ordering the increase, the Court of Appeals noted that Petitioner's counsel had devoted a total of 2,289 hours exclusively

to this litigation and that Petitioner had expended over $78,000.00 in attorneys' fees, travel expense and other out-of-pocket expenses, and that "A highly respected and competent member of the Los Angeles Bar estimated reasonable attorneys' fees for plaintiff in this case at $140,000.00 to $150,000.00." (393 F. 2d 75 at p. 77). This testimony was uncontradicted.

Neither the Trial Court nor the Court of Appeals made a Finding of what the reasonable fees for Petitioner's attorneys were in the case, although the Trial Court made extensive findings of fact as to the work performed and the difficulties confronted by Petitinoner's attorneys (Facts 43-49).

**B. Where the Statute Calls for the Payment of a Reasonable Attorneys' Fee, It Is Improper for the Trial Court to Award Only a Portion Thereof as the Defendant's "Contribution".**

The Trial Court did not award Petitioner reasonable attorneys' fees, but instead concluded that the Respondent was to *contribute* $5,000.00 *toward* Petitioner's fees (Fact 52).

This Court has never interpreted the meaning of "reasonable attorneys' fees" as set forth in 15 U.S. Code, §15. It is submitted, however, that where the Code provides for a reasonable attorneys' fee, the Trial Court does not fulfill its statutory duty by directing the losing defendant to merely "contribute" "toward" such fees.

The "contribution test" suggested and ordered by the Trial Court was specifically rejected as not satisfying the Court's duty in *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents' Conference*, (D.C. Pa. 1958),

166 F. Supp. 163, affirmed 273 F. 2d 218, reversed on other grounds, 365 U.S. 127, 81 S. Ct. 523, but used in *Webster Motor Car Co. v. Packard Motor Car Co.*, (D.C.D.C. 1958), 166 F. Supp. 865, certiorari denied 355 U.S. 822, 78 S. Ct. 29.

The above two District Court cases are the only two cases discussing the point ("contribution test") and are directly in conflict.

**C. Denial of Reasonable Attorneys' Fees Where the Fact of Damage Is Shown But the Amount Thereof Is Considered Uncertain, Is Contrary to the Letter and Spirit of the Antitrust Laws.**

The Trial Court rendered a written, but unreported, opinion regarding its award of attorneys' fees (Appendix "III"). It there stated:

> "It is obvious that counsel has done a prodigious amount of work in presenting this case, but the question before the Court is not necessarily how much should plaintiff's counsel be paid, but rather how much should the unsuccessful defendant be required to contribute to its payment."

The Trial Court then considered the following factors:

(a) A large portion of the final relief granted was injunctive relief.

(b) All the damages claimed was not proved.

(c) The defendant Association was composed of thousands of members, few, if any, of whom, except for the Board of Directors, had any knowledge of, part in, or sympathy for the unlawful acts of the Board.

The last consideration, above, is totally irrelevant to the issue of attorneys' fees and purports to equate the guilt of the corporation for the acts of its officers with the innocence of its members or stockholders.

The fact, if that it be, that Petitioner could not prove with mathematical certainty all its damages, certainly should not require further damages to it by denying attorneys' fees.

The effect of the Court's holding is to avoid the Statutory Mandate to award a reasonable attorney's fee, and the Court of Appeals, by being silent, is permitting the avoidance to remain.

The fact of damage was proven. The Court so found. Therefore the Court should have put the burden of uncertainty on Respondent and not on Petitioner. Requiring Petitioner to pay nearly all of its attorneys' fees is a clear disregard of this Court's admonition:

> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."
>
> *Bigelow v. RKO Radio Pictures, Inc.*, (1946) 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. Ed. 1040.

## Conclusion.

Private enforcement of the Federal Antitrust Laws has always been considered by this Court as an important aid to the general scheme of antitrust enforcement. Yet, if an individual or relatively small business is faced with the burden of not only having to prove that he has been wronged and damaged by

violations of antitrust laws, but also that unless he can prove all of his damages with mathematical preciseness, he may have to suffer the additional burden of very costly attorneys' fees and related costs, it is doubtful that private enforcement can be expected to continue.

For the reasons stated, it is respectfully submitted that this Petition for Certiorari be granted.

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## APPENDIX I.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

Courtesy Chevrolet, Inc., a corporation, Appellant, v. Tennessee Walking Horse Breeders' and Exhibitors' Association of America, a corporation, J. H. Amos, S. W. Beech, Jr., U. French Brantlet, Ed. S. Ezell, Sr., W. F. Fessey, W. V. Garnier, W. W. Gill, C. C. Turner, and J. Glenn Turner, Appellees. No. 19385.

United States Court of Appeals, Ninth Circuit. May 3, 1965.

Civil antitrust action against Tennessee horse breeders' association. The United States District Court for the Southern District of California, Central Division, Jesse W. Curtis, J., granted motions to quash service of summons and complaint and to dismiss for lack of venue. An appeal was taken. The Court of Appeals, Pence, District Judge, held that where the regional vice president of the horse breeders' association resided in the Southern District of California, an affiliate was found there, the association sent its judges into the district to implement objectives of the association and the acts of the association complained of had their primary damaging effect upon the plaintiff in that district, the venue of the action was in that district.

Reversed.

Before BARNES and HAMLIN, Circuit Judges, and PENCE, District Judge.

PENCE, District Judge.

The plaintiff-appellant in this private antitrust suit has appealed from an order granting the defendants' motion to quash service and to dismiss for lack of venue.

From the record, it appears that the Tennessee Walking Horse Breeders' and Exhibitors' Association of America (Association) is a Tennessee general welfare corporation with its only office at Lewisburg, Tennessee, and with its objectives:

> "* * * to collect, record and preserve the pedigrees of the strain of horses known as the Tennessee Walking Horses, wherever located, and the publication of a Register in such form as shall be adopted by the Association, and such other matters pertaining to the breeding, exhibiting and sale of the strain of horses known as the Tennessee Walking Horses as may be deemed advisable." (By-Laws, Article II.)

The Association is the only one in the United States in which the Tennessee Walking Horses may be registered as such. Without such registration a horse cannot compete in Tennessee Walking Horse shows, and no foal of any unregistered Tennessee Walking Horse may be registered as a Tennessee Walking Horse. The Association's by-laws permit the registration of Tennessee Walking Horses by non-members of the Association, as well as members, but at a different charge. Initial membership fees and annual membership dues are required to be paid by each member.

The Association receives at and sends from Lewisburg, Tennessee, through the mail, "papers pertaining to the pedigree, registration and transfer" of Tennessee Walking Horses, and makes and receives charges for this service. The services in regard to pedigree papers, registration and transfer paper is the most substantial part of the Association's business.

The Association collects and disseminates information concerning the breed to its members throughout the United States, sending eleven newsletters per year to each of its members. Its by-laws provide that in the exhibiting and judging of all Tennessee Walking Horses, the Rules and Regulations promulgated by the Judges and Judging Committee of the Association shall be the official rules by which all such horses are to be exhibited and judged. (Articles XIV and XV). The by-laws also provide for regional vice-presidents to be elected by members of the Association, who shall not be eligible to serve as members of the board of directors but shall perform such duties as they are called upon to perform by other officers and the board of directors —in order to develop a group of persons having proven interest and experience in the affairs of the Association from whom can be selected the future leaders of the Association. (Article VIII).

At the time this suit was filed and service was made upon him, Dwain Clark, a Los Angeles attorney, was California Regional Vice-President.

There are approximately 100,000 Tennessee Walking Horses registered with the Association, and of the 1,771 members of the Association as of December 1963, 67, or about four per cent, had California addresses. Appellees' counsel at argument assumed that one-half of these were in the Southern District of California. There are approximately 150 owners of Tennessee Walking Horses in California and six major Tennessee Walking Horse breeders and stables are in Southern California.

In 1950, the Association issued a "Charter of Affiliation" to the Tennessee Walking Horse Breeders' Asso-

ciation of California. No charge was made for this, nor do either the Association or the California Association contribute financially to each other. The California Association has collected dues for both itself and the Association.

The Association's executive secretary attended two horse shows in California in 1959 and one in each of the years 1961, 1962 and 1963, two of which were in the District of Southern California. It paid travel expenses and supplied a judge for the Walking Horse classes in the 1961 and 1963 Southern California horse shows.

In April 1963, the executive secretary of the Association, H. Tom Fulton, write to Mr. Paul Raines of Memphis, Tennessee, giving him a guest card to judge the Sacramento show and in the letter ridiculed and disparaged the California exhibitors and their shows. This letter came to the attention of R. M. McClure, president of the appellant corporation and also then the Regional Vice-President of the California District, who instantly raised a complaint on behalf of the California exhibitors. Mr. Amos, chairman of the board of directors of the Association on June 21, 1963, wrote McClure that the board would hear a complaint concerning the Fulton letter on July 13, 1963, at the Association's office in Lewisburg, Tennessee. The letter was not properly addressed and was never received by McClure. On July 1st, Amos sent a telegram to McClure quoting the contents of the June 21st letter. On July 2nd, McClure wired back that the July 13th date was unacceptable because it was the first day of the Santa Barbara Horse Show, one of the Tennessee Walking Horse "point shows" which California exhibi-

tors were expected to attend, and asked that a different date and place of hearing be granted. On the same day, Amos answered by telegram that the board of directors would meet to hear the complaint on July 13th and they expected McClure to be present.

McClure did not go to Tennessee on that date and by letter dated July 15, 1963, the Association notified the appellant that it had voted to deny the appellant, and McClure as its agent, the services of the Association because of McClure's failure to appear and prosecute his complaint. This letter was amplified by another letter of August 5, 1963, to appellant's counsel, wherein Amos stated that the appellant was denied the services of the Association, "which means all and any services that the Association can render it's [sic] members, including the registration or transfer of horses, or showing before its Judges. * * *"

Meanwhile, on July 24, 1963, appellant forwarded applications for registration of three foals and on August 9th appellant was notified by the Association that the applications were being held for attention at a later time, as was action on the certificate of registration and transfer for a horse to appellant.

As of October 1963, appellant owned approximately 27 Tennessee Walking Horses with an average value of between $5000-$6000. Eight horses of the breed were being trained and boarded at appellant's stables and appellant's principal breeding stallion who serviced from 12 to 24 mares per year commanded a stud fee of $150 per service. The annual payroll of the stables was $49,800. Appellant alleged that the Association had complete monopoly over the registration and trans-

fer of the breed and that it refused and denied this service to the appellant. Thus appellant was unable to register any of its foals, was unable to sell its yearlings because of inability to produce certificates, and was unable to show its horses.

Membership in the Association is a prerequisite to membership in the California Association. Therefore, when, on March 5, 1964, the Association wrote to the California Association, returned a check together with three membership applications, stated that the applications were not on a proper form, enclosed "National Association Membership Forms" to be used by the California Association for new members, advised that two named persons had paid their dues to the Association, stated that the Association would not accept the dues tendered for the appellant, Courtesy Chevrolet, Inc., corporation and added "that Mr. McClure and the Courtesy Chevrolet Company's membership is under suspension at this time [and] therefore, he cannot be considered as a director of your group nor could we accept dues from him at the present time for the Courtesy Chevrolet Company," the California Association thereupon removed McClure from his position as a member of the California Association board of directors. Thereafter, too, all horses owned by the appellant were disqualified from participating in California High Point Awards in Tennessee Walking Horse shows for lack of membership by appellant in the California Association.

This antitrust action was brought in December of 1963 and service of summons and complaint was made on the Association's Regional Vice-President, Dwain Clark, with proper endorsement being made on the sum-

mons served in accordance with California Code of Civil Procedure, § 410.[1]

The Association moved to quash the service of summons and complaint, and to dismiss for lack of venue, which motions were granted by the trial court in April 1964. From those orders, this appeal has been taken.

The preceding recitation of facts which were before the district court[2] has been set out in lengthy detail be-

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[1]The suit as filed named all of the directors of the Association as defendants, and service on them was attempted by serving Clark. Appellant confesses that the district court correctly granted the motions to dismiss the action and quash the service of summons and complaint as to the individuals. This court, therefore, does not concern itself with that problem.

[2]Hearing on the motions to quash service and dismiss for lack of venue was held on February 24, 1964. Thereafter an affidavit was filed by McClure, with copies to defendants' counsel, setting forth additional alleged facts pertinent to the disposition of the motions. Defendant immediately filed a motion to strike the same, with which was attached a letter of defendants' counsel to plaintiff's counsel dated March 24, 1964, which likewise contained additional "facts." Appellees have objected to this court considering any of the matters contained in McClure's affidavit or defendant's letter.

The transcript of the hearing of April 20, 1964, when the district court granted the defendant's motion to quash service and dismiss, shows the following:

> "Mr. Hansen: [Appellant's counsel] * * * I assume the court has had an opportunity to see the affidavit that we filed. * * *
>
> "The Court: Yes. I have also seen the one in support of the motion to strike. * * *
>
> * * * * *
>
> "The Court: * * * All I know is * * * the impression I get from the affidavits, which could be wrong. If the matter would ever come back to me * * * you might find it easy by showing the other facts to change my mind. * * *"

It thus appears that the court did not strike plaintiff's affidavit but considered the "facts" stated in it, as well as those contained in defendant's letter of March 24th. This court has done likewise, and the above outline of pertinent facts includes some set out in both the affidavit and letter. Cf. Johnson v. Banducci, 212 Cal.App.2d 254, 260, 27 Cal.Rptr. 764.

cause such is necessary for imposition of the only rule of law which is uniformly applicable to all cases involving venue, viz., the decision depends entirely upon the particular facts involved.

The Association does not deny that it is engaged in commerce. Admittedly it is a nation-wide organization having members throughout America, and its services and "its Judges" are intended, as stated in its by-laws, to promote the "breeding, exhibiting and sale" of the Tennessee Walking Horses "wherever located." It acknowledges that about two per cent of its members and six major Walking Horse breeding stables are in the Southern District of California.

This being an antitrust action, in order that the District Court for the Southern District of California may entertain the case, it must appear from the record that the Association is either an inhabitant of that district, or has an agent there, or is found, or transacts business therein. 15 U.S.C.A. §§ 15, 22.

It is conceded by the Association that the controlling question here is that of proper venue, and if venue is laid in the Southern District of California, the matter of process is of no practical import, because under the Act, service can be made on the Association in Tennessee. 15 U.S.C.A. § 22.

Appellant agrees that the Association is not an inhabitant of the Southern District of California but urges that not only was the Association transacting business in the district but that it was found in that district by virtue of its Regional Vice-President residing in the district, he being an officer of the Association elected specifically for the purpose of representing the Association's interests in the California region.

It is admitted by the appellant that all the Association's income comes from registration and transfer fees and dues of members, received by it in Tennessee. The Association urges that it has conducted no business in the State of California; that all of its acts concerning registration, pedigree and transfer of horse ownership take place in Tennessee. It insists that because its Regional Vice-Presidents under the by-laws are granted no power, authority or duties, except such as may be specially given them by the Association, and none were so given the California Regional Vice-President, he cannot be considered its agent in California. It also insists that the California affiliate is not controlled or dictated to in any way except that a prerequisite to membership in that affiliate is membership, in good standing, in the Association.

The narrower question therefore is: Does the record show that the Association was doing business,[3] or was found, within the Southern District of California, within the meaning of the anti-trust laws?

The Association urges that its sending of judges into California for three shows was but a casual courtesy or service of the Association. That this was one of the means by which the Association maintained its powerful status in California is manifest from the letter of August 5, 1963, wherein the Association denied to the appellant the right to show its horses "before its Judges." From that statement alone the activity of its judges in California as part of the Association's

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[3]Eastman Kodak Company v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1926).

service might possibly singly meet the minimal requirements of doing business in California.[4]

The Association argues, nevertheless, that except for the appearance of its judges at the horse shows and the presence of its Regional Vice-President in California, that all of the Association's contacts with California are made by mail out of its Tennessee headquarters and that these contacts do not measure up to the peculiar situation ruled upon by the Supreme Court in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

Conceding that the facts here are not on all fours with McGee, such argument, however, ignores the fact that the Association makes its money out of every Tennessee Walking Horse foal that is dropped in California and registered in Tennessee and every horse that is sold in California and transferred on its Tennessee books, and that one of its basic means to promote those registrations and transfers is the exhibition of the breed before "its Judges", and even more important, it overlooks the fact that even though the Association otherwise operated in California by mail, by mail it deliberately and intentionally brought about *in California* the very injuries now complained of.

As indicated, the letter of April 1963 which the executive secretary of the Association wrote to Raines was intended to, and did, affect only the California exhibitors of the Tennessee Walking Horses. It was calculated to affect the reputation, commercial value, stud fees and sale of the California show horses. Fur-

[4]Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L. Ed.2d 1283 (1958).

thermore, the letters of July 15 and August 5, 1963, from the Association to the appellant unequivocally were intended to, and did, deny to the appellant all of the services of the Association, "including the registration or transfer of horses, or showing before *its Judges.* * * *" (Emphasis added.) These letters were intended to, and did, foreclose the appellant from carrying on its Tennessee Walking Horse breeding and sale business in California. This unilateral act of denying the services of the Association to the appellant, even though made in Tennessee, was intended to, and did, have its primary effect in the Southern District of California.[5]

By its acts emanating out of Tennessee, the Association thus deliberately and directly: (1) prevented the appellant in the Southern District of California from registering any foals dropped by appellant's horses—thus practically preventing any sale of the same to potential Tennessee Walking Horse buyers in the California or any other market; (2) by refusing to register the transfer of Tennessee Walking Horses to the appellant, stopped appellant's normal and substantial trade in the same in the California or any other market; and (3) ruled out any possibility that appellant's horses might be shown before "its [the Association's] Judges", thus making sure that appellant's stables were completely out of show competition—in California where appellant's horses had been show winners.

Although the appellant in California had violated none of the Association's "rules" save that of disagree-

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[5]Cf. United States v. Scophony Corp., 333 U.S. 795, 808, 68 S.Ct. 55, 92 L.Ed. 1091 (1948).

ing with the executive secretary and the board of directors and failing to appear in Tennessee when arbitrarily ordered to—acts not forbidden by any of its by-laws—nevertheless the Association denied to it in California as well as Tennessee, even services normally and regularly given to non-members.

If more evidence of the Association's "transaction of business" in California were necessary, it is supplied by the action of the Association in directing and causing the California affiliate not only to drop the appellant corporation from its membership but likewise to drop McClure, appellant's president, from his office as a director of the affiliate.[6]

While only one act may be enough to fulfill the venue requirements of the statute,[7] in each case it is the totality of all of the facts which determines whether the defendant is doing business, or found, in a district.[8] Here, not alone was two percent of the Association's total membership found in the district;[9] not alone did a Regional Vice-President reside in the district; not alone was an affiliate found there; not alone did the Association repeatedly send "its Judges" into the state and district to implement an essential objective of the Association;[10] but, added to all of those facts, the

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[6]Cf. Mechanical Contractors Association of America, Inc. v. Mechanical Contractors Association of Northern California, Inc., 342 F.2d 393 decided February 8, 1965. (9th Cir.)

[7]L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F.2d 768 (9th Cir. 1959).

[8]Travelers Health Ass'n v. Com. of Virginia ex rel. State Corp. Comm., 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950).

[9]Brandt v. Renfield, 278 F.2d 904 (8th Cir. 1960).

[10]Yonce v. Miners Memorial Hospital Ass'n, 161 F.Supp. 178 (D.C.W.D.Va. 1958).

Association deliberately undertook to and did wield its power in California to directly and substantially affect the commerce in Tennessee Walking Horses in that state. The sum of all of these facts added up to doing business in the state and district within the broad concept and objectives of 15 U.S.C.A. § 22, and the taking of jurisdiction by the district court would be consistent with the words and intent of the antitrust acts. Here certainly, there have been " 'such contacts of the corporation with the state of the forum as to make it reasonable * * * to require the corporation to defend the particular suit which is brought there.' International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, at 317, 66 S.Ct. 154, 90 L.Ed. 95. Here, the acts done in California, 'because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.' Id. at 318, 66 S.Ct. [154] at 159."[11]

Similar to the holding of this court in Mechanical Contractors,[12] we here also "think that the totality of the facts shown by this record satisfies the three tests laid down by us in L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 9 Cir., 1959, 265 F.2d 768, and Kourkene v. American B.B.R. Inc., 9 Cir., 1963, 313 F.2d 769. There has been the doing of some act, or the consummation of some transaction, within the forum."[13] We conclude that the claims of the appellant arise out of or result from just such acts and transactions.

Having determined that the Association was transacting business in the Southern District of California, it

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[11]Mechanical Contractors, see note 6, supra.

[12]Ibid.

[13]Ibid.

is unnecessary for us to determine whether the Regional Vice-President was the Association's "agent" in California or that through him the Association is "found" there.

Although, as agreed to by the Association, once venue is found to lie in the Southern District of California the matter of service becomes of minor import, we think that the service of process upon the Association's Regional Vice-President was sufficient. There is no contention that the Association did not have immediate and adequate notice of the suit or sufficient time to prepare its pleadings and appear. "The rationale of all rules for service of process on corporations is that service must be made on a representative so integrated with the corporation sued as to make it a priori supposable that he will realize his responsibilities and know what he should do with any legal papers served on him."[14]

It is to be noted that this court is not holding that every national non-profit association is subject to suit in any state in which it has members or affiliates or happens to have an officer residing there.[15] We do but again say that the salient law on the question of venue, viz.: its determination depends upon the precise facts before the court, will be applied to each case coming before us.[16]

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[14]19 C.J.S. Corporations § 1312, p. 995. See also, Koninklijke Luchtvaart Maatschappij v. Curtiss-Wright Corp., 17 F.R.D. 49, 51 (D.C.S.D.N.Y. 1955).

[15]Cf. Elizabeth Hospital, Inc. v. Richardson, 167 F.Supp. 155 (D.C.W.D.Ark. 1958); Wentling v. Popular Science Publishing Co., 176 F.Supp. 652 (D.C.M.D. Pa. 1959); Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n, 102 F. Supp. 649 (D.C.D. Minn. 1951).

[16]Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

It must at all times be remembered that this case is still only at the pleading stage; we are not considering its merits; and nothing that we have said herein is to be construed as indicating we believe the Association's acts were necessarily proscribed or that the appellant has a good cause of action against the Association. All that we hold is that, on the record before us the Association's activities in California were such as to fulfill the minimal requirements for venue, in this antitrust action, to lay in the Southern District of California, and that service of process was properly made upon the Association there.

The basis of the district court's decision that venue would not here lie, does not appear from the record. Our own findings demand reversal and it is so ordered.

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## APPENDIX II.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Courtesy Chevrolet, Inc., a corporation, *Appellant,* vs. Tennessee Walking Horse Breeders' and Exhibitors' Association of America, a corporation, *Appellee.* No. 21,702.

[April 16, 1968]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, HAMLIN and KOELSCH, Circuit Judges.

PER CURIAM:

This case is before us for the second time (*Cf.* 344 F.2d 860). On trial, the district court found that defendant-appellee, the Tennessee Walking Horse Breeders' and Exhibitors' Association of America, a corporation, had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and had injured plaintiff-appellant, Courtesy Chevrolet, Inc., a corporation, in the sum of $3,400, trebled to $10,200. The trial court awarded $5,000 attorneys fees and costs taxed at $4,603.92. Somewhat extensive injunctive relief was also ordered.

The corporate plaintiff-appellant entered into the business of breeding, raising and training Tennessee Walking Horses in 1962, investing some $711,218.70 in facilities for such an operation prior to July 13, 1963. The district court found that on that date the

defendant Association arbitrarily and unreasonably suspended plaintiff's membership in the Association and published notice of this action in the defendant's Bulletin. The registration of horses, the transfer thereof, and the showing of plaintiff's horses before judges of the Association, all were denied plaintiff; and colts sired by one or more of plaintiff's stallion were denied registration.

In the first year of plaintiff's operations, 1962, plaintiff lost some $10,000. In the second year of operations, the loss was $13,199 in the first six months, and in the last six months (after the suspension of membership) plaintiff's losses amounted to $9,406 (Ex. B). When applications for registration were made by plaintiff for three foal after July 13, 1963, they were denied, as were certain applications for registration forwarded by persons disassociated from plaintiff but owning mares with colts sired by a stallion owned by plaintiff.

Finding 41 was that plaintiff lost, by reason of defendant's suspension and refusal to register, seventeen stud fees for the year 1964, at $200 each. This was the basis of plaintiff's damages for 1964 of $3,400. The trial court then found (Finding 42), "The evidence of other damage to plaintiff is too indefinite and speculative to permit the court with any degree of certainty to estimate the amount thereof."

This last finding of fact is assigned as error; the ward of damages was claimed inadequate and contrary to the evidence; and the attorneys' fees awarded are claimed inadequate as a matter of law, are alleged to be contrary to the evidence, and are allegedly based on an incorrect theory of the law.

After careful review of the record in the case and due consideration of the briefs and oral arguments of the attorneys, we are unable to say that the findings of fact of the district court and its conclusions of law thereon are clearly erroneous in respect to the award of $10,200, although the compensation allowed seems quite low in the circumstances.

But we are of the opinion and so hold that, where the statute requires allowance of "a reasonable attorney's fee," the trial court abused its appropriate discretion in allowing the attorneys for the plaintiff-appellant an inadequate award of but $5,000 in attorney's fees for their excellent professional services. The successful prosecution of plaintiff's suit required learning, skill and experience in the specialized field of litigation involved (Finding 46), and the expending of a tremendous amount of time and labor by the attorneys. At the hearing held upon the issue of appropriate attorneys' fees it was proved by uncontroverted testimony that plaintiff's attorneys, subsequent to the last appeal, had devoted a total of 2,289 hours exclusively to this litigation (Finding 45). Both plaintiff's and defendant's counsel were found to have outstanding reputations at the bar (Finding 44).

Findings 49 and 50 read: "It is obvious that counsel has done a prodigious amount of work in presenting this case," and "Plaintiff has expended $78,496.40 in attorneys' fees, travel expense and other out of pocket expenses." A highly respected and competent member of the Los Angeles Bar estimated reasonable attorneys' fees for plaintiff in this case at $140,000 to $150,000.

It is true that the court considered, and properly considered, that a large portion of the relief granted was of an injunctive nature.

While the allowance of reasonable attorneys' fees is always a matter of delicacy—either when billed by the attorneys themselves or when fixed by the courts—the object always, of course, is to allow fair and just compensation for the services rendered, considering the time and skill employed, the experience brought to bear, and the results achieved. In the light of these considerations, we think a minimum fee, to the attorneys for the appellants in this case, should have been $10,000.

Accordingly, the judgment of the district court is reversed in this aspect alone; and in all other aspects is affirmed. The cause is remanded with directions that the district court enter judgment in favor of appellant for attorneys' fees, and against defendant, in the sum of $10,000.

## APPENDIX III.

**Memorandum Opinion Re Attorneys' Fees and Costs.**

United States District Court, Southern District of California, Central Division.

Courtesy Chevrolet, Inc., a corporation, Plaintiff, vs. Tennessee Walking Horse Breeders' and Exhibitors' Association of America, a corporation, et al., Defendants. No. 63-1516-JWC.

The plaintiff, feeling the impact of certain monopolistic and arbitrary practices of the defendant, Tennessee Walking Horse Breeders' and Exhibitors' Association of America, has brought this adtion for treble damages under the Clayton Act and has succeeded in obtaining an award of damages in the amount of $3,400 trebled, together with an allowance of attorneys' fees and court costs, the amount of which is presently before this court for determination.

Plaintiff is urging an allowance for both attorneys' fees and court costs in the approximate sum of $78,000, based upon the novel and difficult law involved, the tremendous research and discovery undertaken, eminence of counsel and the overall results accomplished, which includes rather broad injunctive relief against the practices complained of. Other considerations generally applicable in anti-trust cases have also been urged.

There are, however, some unusual considerations present in this case. This dispute arose when plaintiff became offended by unflattering comments contained in a personal letter from the executive secretary of the defendant and addressed to a judge at one of the horse shows. In plaintiff's attempt to bring about the discharge of the executive's secretary, members of the

board of directors became involved, personally and emotionally. Tempers became inflamed, which resulted in the board of directors, using the power of its office, suspending the plaintiff from the privileges of membership in the Association. At this point the parties were only an apology apart, yet neither would apologize and neither were in the least conciliatory. Plaintiff thereupon filed this action, employed counsel and became immediately immersed in highly expensive litigatin, mainly for the purpose of bringing about his own vindication.

It is obvious that counsel has done a prodigious amount of work in presenting this case, but the question before the court is not necessarily how much should the unsuccessful defendant be required to contribute to its payment.

The courts are reluctant to impose upon an unsuccessful defendant the obligation to pay the attorneys' fees in the presentation of the entire case where a large portion of the relief is of an injunctive nature. *Alden-Rochelle, Inc. v. American Society of Composers,* 80 F. Supp. 888, at 889 (S.D. N.Y. 1948); *Declarative Store Co. v. Building Trades Council,* 23 F. 2d 426 (2nd Cir. 1928); *Berjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 F. Supp. 476 at 489 (E.D. Mo. 1965) Furthermore, a court may not properly consider the time and effort spent in bringing claims of damage which were not proved. *Union Leader Corp. v. Newspapers of New England, Inc.,* 218 F. Supp. 490 (U.S.D.C. Mass. 1963); *Osborn v. Sinclair Refining Co.,* 207 F. Supp. 856 at 864 (U.S.D.C. Md. 1962).

Pertinent also to this consideration I think is the fact that the defendant association is composed of thou-

sands of members from all over the United States, few, if any, of whom, with the exception of the members of the board of directors, had any knowledge of, part in, or sympathy for the position taken by the members of the board. Furthermore, most of the members of the offending board are now dead or removed from office.

Under all the circumstances present here, taking into account on the one hand the extensiveness of preparation, the eminence of counsel, the difficulty of the task undertaken, and on the other hand taking into account the amount of the damages recovered and the relatively large portion of the final results which amounts to injunctive relief and to a vindication of plaintiff's position in the controvery, I find that a reasonable amount to require the defendant to pay plaintiff's attorneys as attorneys' fees and court costs is the sum of $5,000.

Dated this 13th day of September, 1966.

Jesse W. Curtis
United States District Judge

## APPENDIX IV.

### Oral Decision of the District Court.

### [Rep. Tr. of Proceedings pp. 1269-1277]

THE COURT: I have indicated earlier, and I will indicate again, that this was a case I felt which was unfortunate in that it was primarily a family squabble.

I suppose Mr. McClure has some justification to get upset over the letter which wasn't addressed to him. Maybe he was justified in making a complaint to the Association about the executive secretary.

But so far as the activity of the Association is concerned in setting up a hearing and refusing to continue it to a time when Mr. McClure could be there, and the rather summary fashion in which they suspended him, I think it fits the definition, although it may be in a rather minor fashion, nevertheless fits the definition of a violation of both Section 1 and Section 2 of the Sherman Act.

I think these men were breeders. They have demonstrated here, those who have been here, a certain impatience and jealousy and antagonism, it seems to me, to Mr. McClure. I think this action was taken with the expectation that it would be a substantial harassment, at least.

As such it has interfered in some fashion, to some extent, with interstate commerce. I am sure there is, and the evidence has indicated that there is, interstate commerce involved here, although it may not be a very serious and tremendous amount.

But, as I say, I think even though the evidence may show it is to a minor degree, nevertheless it does fit

the definition, and I think the defendant therefore is guilty of violation of these two sections.

The court will therefore enjoin the defendant from refusing to register any Tennessee Walking Horses owned by the plaintiff and any foal from mares bred by the stallions owned by the plaintiff, including specifically any foal from mares owned by third persons and bred by stallions owned by the plaintiff upon application therefor in proper form and payment of the prescribed fee for members.

The defendant Association will also be ordered to register the transfer of any Tennessee Walking Horses owned by the plaintiff and foals from mares bred by stallions bred by the plaintiff upon application therefor in proper form and payment of the prescribed fees for members.

I think it appears here too that the plaintiff was illegally suspended as a member of the Association and, therefore, it is ordered that he be reinstated.

Now we come to the question of damages, which has been the matter which has concerned me from the very beginning. The plaintiff contends that he, first of all, should be entitled to recover on a percentage of the return theory upon his investment. This seems to me to be absolutely without support.

We have here in the first place the testimony of many witneses, testimony which varies tremendously and indicates what is, it seems to me, obvious anyway that this is such a speculative business that no one can predict with any degree of certainty whatever the percentage of return might be expected upon any given investment.

I am not sure that it would ever be possible to prove damage in this way. But I can conceive of it being more nearly possible if you were dealing with a Market Basket or a shopping center where you have a constant supply and demand and uniform quality and lots of experience and more or less uniform practices.

But with a Walking Horse business or a thoroughbred horse farm you have so many variables that it seems to me this theory of damage cannot be supported in any degree.

Then the projected theory has been advanced by the plaintiff as they have projected ahead the progress of the ranch and what they anticipate in the way of foal and the percentage of show horses and top horses, and so forth.

This, of course, is a part of a good business operation to have some kind of a guess as to where you are going to go, but it is certainly no indication as to where the operation actually will go.

I think this projection is in itself so highly speculative as to be of no value whatever in determining any damages in this case.

Now, the plaintiff has also asserted that the difference, as I understand it, between the losses in the year 1963 as compared with the losses of subsequent years would be an indication of that portion of the loss attributable to the conduct of the defendant.

We haven't had any very satisfactory breakdown of these losses and what they consist of, but they are an operating loss, and the operations consist of a number of things such as training, boarding, things of that kind, which I assume have no relation whatever to the

act of the defendant. You can still train, you can still board horses I think, and there might be a little probability that that operation would not in any way be restrained by the action of the defendant.

So they, being one of the elements of the difference in the loss theory, we have no basis upon which to determine what portion of the loss, if any, is attributable to the actions of the defendant.

Another element that the plaintiff seems to rely upon is the fact that the failure to register the horses has made it impossible for him to sell his own horses. This I think is a doubtful basis because the horses had not yet, as far as I can understand from the evidence, been sold, and until a horse, even though you may have not been able to sell it at a fancy price some time during this period, until it is sold we don't know whether it will be sold at a loss or not. The testimony here is that the horses have become more valuable and there has been a greater demand occurring in the market, so with this injunction you will be able to sell these horses and we may well presume that they will be sold at a substantial increase in price. So no loss will occur at all by virtue of the fact that during this period these horses could not have been sold. It may have been a blessing in disguise.

Now with respect to the sale of horses of other people, such as commission sales, the evidence in that respect I think has not been specific enough to show any loss attributable to that factor.

The diminution in value of the property would not be a proper basis for damage since the business is not ruined, it can continue, the property could be used for

the purposes for which it has been designed, and the testimony has been that there is practically no depreciation, it is a permanent structure and is probably as good today as it was when it was built, so I cannot see that any damage has occurred there.

It seems to me, and I have thought about this, although the parties have not urged it or argued it, about the only damage I can see here is the loss of stud fees on Mr. Millionaire. Now, of course, they cannot be recouped. I understand that so far as the foals are concerned which have been born in the meantime—and I think an injunction should include that, that all foals born within these last few years during this period of the complaint should be registered, and with that there can be no damage in that respect.

Now we come to the question, as I say the only element of damage that I have been able to find is the loss incurred by reason of the loss of stud fees by Mr. Millionaire, now the testimony here is that in the years 1962 and 1963 Mr. Millionaire was bred several times or he got stud fees, and I would say it was testified that in those days they were breeding him 12 to 25 times a season.

Well, that doesn't give me a very accurate base to go on, but I would think that the best I could do would be to say that we have assumed then that he was actually bred during those years somewhere between 12 and 25, which would be 19 times.

In 1964, which seems to be the only year in which there was any loss, he was only bred two to three times. Well, I have given the defendant the benefit of the doubt with the two times so the loss is 17 stud

fees. And the indication, though it is not very clear, but I think we might assume that it is $200 a fee, he said first at $150 but by 1963 had raised it to $200, so at $200 a fee we get a total of $3,400. This being an antitrust case and the court is required to assess punitive damages by trebling, trebling that figure would bring it to $10,200. That will be the judgment of the court.

If there is some phase of the determination which I have not covered and you wish me to tell you how I feel about it, why, I am here to let you know. I think I have covered everything that is involved.

MR. WARD: I believe there are two matters, if I may, your Honor, that I would like to inquire about.

One, in the suggested form with points and authorities—maybe your Honor did consider it—was the requirement that the judgment be published in the Bulletin.

THE COURT: I intended to include that.

MR. WARD: Thank you.

A second phase, if I may—and I assume you will want us to prepare findings of fact and conclusions of law?

THE COURT: Yes.

MR. WARD: —so I will include that.

And the second is the matter of expenses and fees. Now I understand fees would be set down for a hearing at some future date, depending upon the judgment that your Honor has just announced, but there was a showing and offered into evidence a list of expenses and fees paid to my predecessor counsel and fees paid to us.

If it would be of any assistance, we contemplated at such time as your Honor might hear us, and if an expert or two would be of any assistance to appraise the work accomplished, we expected to offer that testimony.

I said that I assumed that it was premature because if we didn't get recovery, and there was no judgment for the plaintiff, there would be no fees.

THE COURT: I understood that that matter was to be discussed subsequently.

MR. WARD: Yes.

THE COURT: And there will be an opportunity given to you for a hearing on attorney fees and court costs.

MR. WARD: And out-of-pocket expenses.

THE COURT: And out-of-pocket expenses.

MR. WARD: Very well. Your Honor, those are the only two questions I had.

THE COURT: Well, gentlemen, I have enjoyed trying and hearing this case. It was an interesting case. But, like all cases, you cannot please everybody, and like many cases you please nobody. This may be more applicable here than in many cases. But that is the best I can do, and with that we will stand adjourned.

MR. HOOKER: Thank you.

MR. WARD: Thank you.

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